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CHARLES ELMORE GROPLEY
CLERK

Supreme Court of The United States

OCTOBER TERM, 1944

POINT BREEZE EMPLOYEES
ASSOCIATION, INC.,

Petitioner,

v.

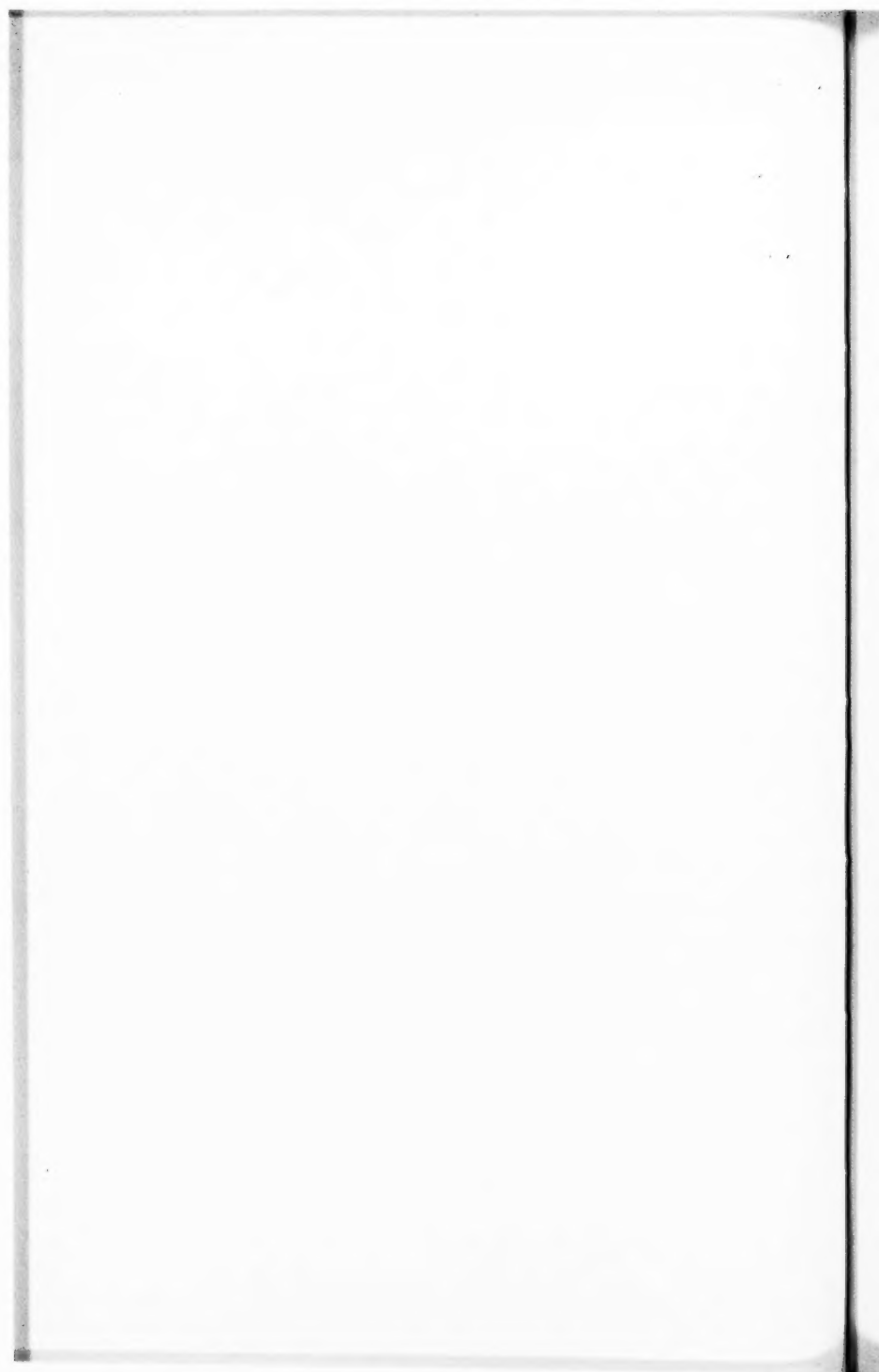
NATIONAL LABOR RELATIONS
BOARD,

Respondent.

No. 988

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FOURTH CIRCUIT

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*To the Honorable, the Chief Justice of the United
States, and the Associate Justices of the
Supreme Court of the United States:*

Point Breeze Employees Association, Inc. (hereinafter called the "Association"), prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fourth Circuit to review the decree of that Court entered January 3, 1945, in the above entitled cause, denying a petition to review and set aside, and enforcing, an order of the National Labor Relations Board (hereinafter called the "Board"), dated August 9, 1944, under Section 10 of the National Labor Relations Acts, 49 Stat., 449 (hereinafter called the "Act"), directing the Western Electric Company, Incorporated (hereinafter called the "Company") to disestablish this Association and to cease interfering with its employees in the exercise of the rights guaranteed by Section 7 of the Act.

A stay of mandate pending the action of this Honorable Court was issued by the Circuit Court of Appeals on January 27, 1945.

Jurisdiction

The jurisdiction of this Honorable Court is invoked under Section 10(e) of the Act and Section 240(a) of the Judicial Code as amended, 28 U. S. C., Section 347(a).

The Opinions Below

The decision of the Board finding against this Association was rendered August 9, 1944 (R. 64).

The majority opinion of the Circuit Court of Appeals for the Fourth Circuit enforcing the order of the Board on additional grounds rendered January 3, 1945 (R. 323) is not yet officially reported. The minority dissenting opinion of the Circuit Court of Appeals for the Fourth Circuit recommending the setting aside of the order of the Board was rendered January 3, 1945 (R. 332) and is not officially recorded.

Statute Involved

The Statute involved is the National Labor Relations Act, 49 Stat., 449. The Board's order related to alleged violations of Section 8 (1) and (2) of the Act, which read as follows:

"Sec. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it:

Provided, That subject to rules and regulations made and published by the Board pursuant to Section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

Section 7, referred to in Section 8 (1) above, reads as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Statement of Case

This cause involves the majority decree of the Circuit Court of Appeals for the Fourth Circuit enforcing an Order of the Board finding that this Association is dominated by the Company which is thereby violating Section 8 (2) of the Act, and ordering the disestablishment of this Association the bargaining agent for the employees at the Point Breeze, Baltimore, Maryland, plant of the Company.

This Association was organized by the employees in June, 1937, when as a result of the decision of this Honorable Court in the Jones & Laughlin Steel Corporation case (301 U. S. 1) the Company, in April, 1937, terminated the employees' representation plan. The employees desiring someone to represent them and deal with the Company voted to form an independent union. At that time there was no other union wanting or attempting to represent and bargain for these employees.

The Board based its conclusion of present Company domination on the theory that the Association is a suc-

cessor to the Company dominated plan (R. 325), because of three principal things:

(1) That the Company did not give direct notice to each employee of the termination of the plan.

(2) Acts of the employees in organizing in accordance with the advice of their attorney.

(3) That the Company acceded to the demands of its employees, after they were evidenced by a secret vote.

In reaching its conclusion of successorship and Company domination the Board ignored:

(1) The knowledge of all employees of the termination of the plan (R. 74) (R. 326).

(2) That the employees voted on and for every act of the organizing committee after first voting for the committee (R. 76-79-81).

(3) The fact that the Company did not render assistance of any kind to the Association or its organizers.

(4) That the Company under the Act had to accede to the demands of those employees and recognize their duly chosen bargaining agent.

(5) That the War Labor Board had found that the Company and the Association were too antagonistic and recommended that they become more friendly and place more confidence in each other.

The majority opinion of the Circuit Court of Appeals merely follows the decision of the Board and adds thereto other matters that the Board itself did not find or rely upon in making its decision and on the basis thereof sustains the Board and completely ignored the finding and decision of the War Labor Board.

The minority dissenting opinion of Judge Soper, reviews and considers in great detail the facts on which the Board relied and finds that there is no evidence upon which the Board based its finding and Order and that the undisputed evidence ignored by the Board shows definitely that the War Labor Board was right and that the Association is not only not dominated by the Company, but is as a matter of fact independent and aggressive.

The Association alleges that the majority decision of the Circuit Court of Appeals is in conflict with the decision of this Court and of other Circuit Courts of Appeal and involves very important questions regarding the interpretation of the Wagner Act and the rights of labor thereunder and it is imperative that this conflict be definitely settled by this Honorable Court.

Questions Presented

1. Was it error for the Circuit Court of Appeals for the Fourth Circuit to uphold the conclusion of the Board that the Company dominated this Association because the Company's method of notifying the employees of the termination of the plan was found by the Board to be faulty because it lacked some unknown and undetermined formula, when the Board finds as a fact that the termination became a matter of general knowledge among the employees?

2. Was it error for the Circuit Court of Appeals to uphold the conclusion of the Board that the Company dominated this Association because the employees chose by secret ballot certain fellow workmen to form the Association?

3. Was it error for the Circuit Court of Appeals to uphold the conclusion of the Board that the Company

dominated this Association because of acts of the employees in organizing done on the advice of counsel retained by the organizing committee, when there is no evidence or a claim of Company's help or assistance?

4. Was it error for the Circuit Court of Appeals to uphold the conclusion of the Board that the Company dominated this Association by acceding to the demands of its employees to recognize their committee?

5. Was it error for the Circuit Court of Appeals to uphold the decision of the Board that this Company dominated the Association in 1937 because in 1943 a few minor supervisors made personal remarks to a half dozen employees?

6. Was it error for the Circuit Court of Appeals to uphold the conclusion of the Board on grounds not used or relied on by the Board in reaching its decision?

7. Was it error for the Circuit Court of Appeals to ignore the undisputed finding of the War Labor Board, another Governmental agency, that the Association was too aggressive and uphold the contrary conclusion of the Board that the Company dominated this Association, when the question to be decided is present domination?

Specification of Errors

The Circuit Court of Appeals erred in each of the above questions when it sustained the Order of the Board.

Reasons Relied on for Issuance of Writ of Certiorari

1. Error of the Circuit Court of Appeals in holding that the method of notice to the Association was faulty and proved Company domination despite the finding by the Board of proper knowledge by all employees.

On this important question there is a direct conflict between the decisions of the Circuit Courts of Appeal.

The Circuit Court of Appeals for the Seventh Circuit held in *National Labor Relations Board vs. Duncan Foundry & Machine Works, Inc.*, 142 F. 2d 594 (C. C. A. 7-1944), that it was "not necessary for the Company to follow any set formal mechanical pattern of procedure in order to evince disestablishment," the Board in the present case found (R. 74) "in general the representatives told the employees that the Respondent would no longer recognize the plan and that the plan was out," or as Judge Soper said (R. 334), "the uncontradicted evidence made it abundantly clear that the plan was out and they could no longer represent the men or bargain with the management, that the men would have to get a new union, or form one of their own, or choose any organization that they preferred, and it is immaterial to the Company what action they might take. This information passed through the body of the employees like wild-fire * * *".

The majority in this cause held that unless notice was given by the Company directly to the individual employees in writing or at a mass meeting, it was ineffective.

There is on this question a conflict between the Circuit Courts which should be determined by this Court as it is a matter of great importance in the administration of the Act.

2. Was it error for the Circuit Court of Appeals to uphold the decision of the Board that the Company dominated the Association because the employees in execution of the right guaranteed them by the Act chose certain former representatives who were fellow workmen to submit a new form of labor organization.

In *Commonwealth Edison vs. Labor Board*, 135 F. 2d (C. C. A. 7-1943), and *Foote Bros. Gear and Machinery Company vs. Labor Board*, 114 F. 2d 611 (C. C. A. 7-1940, remanded for decision on certified record, 311 U. S. 620, and former decision adhered to, 121 F. 2d 802), the Court held that the action of old representatives in forming a new union was not only insignificant, but was natural.

Here again there is a conflict between the Circuit Courts of Appeal on a matter of great importance in the administration of the Act which should be determined by this Court.

3. Error of the Circuit Court of Appeals in upholding the decision of the Board that the Company dominated this Association because of acts of the employees in organizing done on the advice of counsel retained by the organizing committee, when there is no evidence or even claim of Company help or assistance.

This refers principally to portions of the by-laws of this Association which are claimed to be similar to the by-laws of the disestablished employees representation plan.

In *E. I. duPont de Nemours & Company vs. Labor Board*, 116 F. 2d 388 (C. C. A. 4-1940) Cer. den. 313 U. S., 571, the Court held that this was not a basis for an inference of successorship and Company domination. The Circuit Court of Appeals for the Seventh Circuit in *Labor Board vs. Duncan Foundry & Machine Works, Inc.*, 142 F. 2d 594 (C. C. A. 7-1944), held that similarities between the constitution of the E. R. P. and the union is not evidence of Company domination and said, "If freedom of uninfluenced action contemplated on the part

of the employees under the Wagner Act is to have meaning, we must recognize their right freely to select the plan of operation under which they desire to act."

Here again we have a conflict between the decision of the Circuit Courts on a matter of great importance in the administration of the Act which should be determined by this Honorable Court.

4. Error of the Circuit Court of Appeals in upholding the decision of the Board that the Company dominated this Association because it acceded to the demands of its employees to recognize its elected committee as bargaining agency.

This right to bargain through representatives of the employees own choice is a fundamental right given employees under the National Labor Relations Act and is set forth in Section 7 as follows:

"Employees shall have the right to self-organization, to form, join or assist labor organization, *to bargain collectively through representatives of their own choosing* * * *." (Italics supplied.)

Various Circuit Courts of Appeal have found that recognition by the Company of the bargaining agent chosen by the employees is no evidence of Company domination when there is no other labor organization attempting to organize.

Cupples vs. Labor Board, 106 F. 2d 100 (C. C. A. 8-1939),

Footte Bros. vs. Labor Board, 114 F. 2d 611 (C. C. A. 7-1940),

Labor Board vs. Hollywood Maxwell Co., 126 F. 2d 815 (C. C. A. 9-1942).

The conclusion of both the Circuit Court of Appeals and the Board that the recognition of the chosen representatives showed Company domination is directly in conflict with the provisions of the Act and the decision of various Circuit Courts of Appeal and is a matter of the greatest importance in the administration of the Act which should be determined by this Court. The result of the finding of the Board and the Circuit Court of Appeals on this issue is to nullify Section 7.

5. Was it error for the Circuit Court of Appeals to uphold the decision of the Board that the Company dominated the Association in 1937 because in 1943 a few minor supervisors made personal remarks to a half dozen of 8,000 employees?

This Court and various Courts of Appeals have decided that the statements of minor supervisors made without the consent or approval of the Company cannot be taken to show Company domination in the absence of disciplinary or discriminatory conduct. The insignificance of these few isolated cases is shown by the fact that the trial examiner before whom the witnesses appeared and testified and who had an opportunity to form an opinion as to their truth and veracity and all the other circumstances surrounding the incidents found no violation of the Act on these grounds.

6. Was it error for the Circuit Court of Appeals to uphold the decision of the Board on grounds not used or relied upon by the Board?

This Court in the case of *Labor Board vs. Virginia Electric Power Company*, 314 U. S. 469 (1941), and in

numerous decisions held that it is the function of the administrative agency to draw conclusions and state the grounds on which they rely and that it is not for the Courts to make finding of facts that the agency itself has not found, or of drawing conclusions from the facts not drawn by the agency. The enforcement by the Circuit Court of Appeals of the Board's order on additional facts not found by the Board is a clear violation of the rule established by this Court.

7. Was it error for the Circuit Court of Appeals to ignore the question of present domination and find domination on alleged happenings in 1937?

This Court in *Labor Board vs. Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50 (1943) said, "The Board may appraise the situation and even forbid the appearance of a union on the ballot to select bargaining representatives where in the Board's judgment the evidence does not establish *the union's present freedom from employer control.*" (Italics supplied.) In this case the Board and the Court ignored all evidence of lack of Company domination of this Association, including the finding by the War Labor Board made in a disputed case between this Association and the Company in which the Board, after mentioning the aggressiveness of this union, encouraged this union and the Company to draw closer together for the benefit of all concerned.

The finding of the Fourth Circuit Court of Appeals on this question is therefore in conflict with the decision of this Court on this matter of grave importance in the administration of the Act.

The Circuit Court of Appeals by its finding in this case has done an irreparable injury to this Association and an irreparable injury to all labor by depriving all labor from the benefits given it by Section 7 of the Act. It is necessary for the benefit of labor, this union and its members who are employees of the Point Breeze Plant of Western Electric Company, and who are by this order being denied the free choice of a bargaining agent, that this Court reverse the decision of the Circuit Court of Appeals for the Fourth Circuit so that they may be given the benefits that they are entitled to under the provisions of the Act.

WHEREFORE it is respectfully submitted because of the grave importance of the questions involved in the administration of the Act, and for other reasons set out by this Petition, a Writ of Certiorari to review the decision of the Circuit Court of Appeals for the Fourth Circuit should be granted.

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ASSOCIATION,

Petitioner.

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